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No. 150

In the SUPREME COURT OF THE UNITED STATES

No. 16,720.

WILLIAM A. WEGMANN,
Petitioner,

vs.

NICKOLAS MANNINO et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioner, William A. Wegmann, through the undersigned attorneys, prays that a Writ of Certiorari be granted by the above court to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit dated April 2, 1958, the same being an affirmance of a certain final judgment entered by the United States District Court in and for the Southern District of Florida and filed March 14, 1957.

OPINIONS BELOW.

The final judgment of the District Court appears in Appendix (page A12), and the opinion of the United States Court of Appeals is set forth in Appendix (pages A2-A10) of this petition. To the best of Petitioner's knowledge and belief the said opinions and judgments of the lower courts are unreported at this time.

JURISDICTION.

Petitioner invokes the jurisdiction of this court pursuant to 28 U.S.C.A. 1254 (1) and respectfully shows that Federal jurisdiction of the cause was originally invoked by the Respondents upon diversity of citizenship and an amount in controversy of more than Three Thousand Dollars ($3,000.00).

Petitioner would further show that the opinion and judgment of the law as decided by the courts below is contrary to the decisions of the highest court of the State of Florida to-wit: the Supreme Court of Florida, and that said questions presented by this Petition are of vital local application and should now be settled by this court.

QUESTIONS PRESENTED.

The questions presented by this Petition involve the interpretation of a contract made within the State of New Jersey for performance within the State of Florida and are presented as follows:

1. Must a United States District Court and Circuit Court of Appeals follow rules for the construction of writ-

ten contracts as adopted by the highest court of the state wherein the cause of action accrued.

2. Should the courts of Federal jurisdiction in applying local statutes to specific contractual dealings be bound by the interpretations of the highest court of a state as to the legal effect of certain conduct or contractual dealings of the parties.

3. Where the highest court of a state has not directly decided the specific point or question involved in the interpretation of the statutory law of the state but has tacitly recognized a construction by its decisions in cases similar in point of fact, should the federal courts be bound by the tacit recognitions of the state courts.

STATEMENT OF THE CASE.

Plaintiff-Petitioner, William A. Wegmann, entered into a certain contract in the State of New Jersey on or about February 27, 1954, which as its first document contained the writing annexed to Plaintiff's original Complaint as Exhibit "A", and subsequently made with the Defendants' modifications to the basic contract in the form of Exhibits "B" and "C". The actual contract upon which the cause of action rests is based upon the entire contractual documents which, interpreted together, now constitute the contract of the Appellant before this court. Alleging a breach of the contractual agreement by the Defendant-Respondent, Petitioner filed his Complaint in the Circuit Court of the Sixth Judicial Circuit in and for Pinellas County, Florida. Upon Removal Petition filed by the Defendants, the cause was removed to the United States District Court for the Southern District of Florida.

Upon trial of the case on its merits the court found at the conclusion of the Plaintiff's case that a *prima facie*

case had been proven; however, in response to a motion of the Defendant the court found that Petitioner was not entitled to recovery in that the lower court construed Exhibit "A" to be a contract requiring the Plaintiff to sell real property in contravention of Section 475.01 of the Florida Statutes and ruled that the contract was therefore invalid and unenforceable under and by virtue of the terms of Section 475.41 of the Florida Statutes, both of which sections are quoted at length, Appendix (pages A3 and A4) (the same being footnotes to Opinion of Circuit Court of Appeals on pages numbered A3 and A4).

From the adverse ruling of the District Court, Petitioner perfected his appeal to the United States Court of Appeals for the Fifth Circuit and thereupon the judgment was affirmed in the Opinion of said court dated April 2, 1958 (Appendix, page A11). Petitioner on May 9, 1958, filed a Petition for rehearing and brief in support thereof which was denied by order of the court in due course wherefore Petitioner moved for an order staying the mandate in this cause which order was duly granted on June 3, 1958.

REASONS FOR GRANTING THE WRIT.

Petitioner in the cause respectfully shows unto the court that the District Court and the Circuit Court of Appeals have each failed to recognize a basic premise of the laws of the State of Florida to the effect that a contract is to be construed in its entirety and that therefore the position of the courts below in failing to recognize that the contract of the parties actually consisted of three documents was error.

The Florida court has evidenced its decisions regarding interpretation of contracts in the following citations which Petitioner abbreviates to a minimum in the interest of space and this court's time:

"Courts are not authorized to write a new contract for the parties on the pretext of construing the terms thereof when the wording employed is plain, crystal clear and unambiguous."

Voelker v. *Combined Insurance Company of America*, 73 So. 2d 403, 408 (Florida 1954).

In the case of *South Florida Amusement and Development Company* v. *Blanton*, 116 So. 869, the court held:

"Name and nature of instrument depends on intention of parties; intention of parties to instrument must be gained from its entire contents in light of instruments affecting it; name given to instrument by parties is not controlling unless it squares with intention as expressed in instrument body."

In *Townsend et ux.* v. *First Federal Savings and Loan Association*, 15 So. 2d 199-200 (Florida), the court said:

"It is a fundamental rule of construction that the meaning of any writing is not to be collected from any particular expression, but from a general view of the whole writing; all of its parts are to be compared, used and construed with reference to each other."

In 5 Florida Law and Practice Contracts, Section 66, page 43, there are the concise statements amply supported by abundant Florida citations to the effect that interpretation of a contract should not be made from particular provisions or disjointedly nor from isolated phrases without reference to the agreement as a whole.

In the case of *Pensacola Gas Company* v. *Lotze*, 2 So. 609, decided June 15, 1887, the Florida court held:

"One part of an agreement may be resorted to to explain the meaning of language or expressions of another part."

(Head note 2, Syllabus by the court.)

Petitioner in the case at bar respectfully shows that it is apparent upon the face of the Opinion both of the District Court and from that of the Circuit Court of Appeals that no credence or effect whatsoever was accorded by either court to the basic principles of interpretation and the written modifications Exhibits "B" and "C" (Appendix, pages A17-A18). It is further apparent that the court at all times adopted the view that the only contract of the parties was contained in Exhibit "A" in clear contravention of the decisions of the Supreme Court of Florida and especially those heretofore cited.

It is significant to note that neither Petitioner nor Respondents below have found any cases decided by the Supreme Court of Florida directly construing Sec. 475.01 of the Florida Statutes. The principal interpretations of Section 475 had involved the constitutionality of said statute as a whole which decision had been rendered by the Florida court in *State ex rel. Davis* v. *Rose,* 122 So. 225. On two occasions the statute in question had been dealt with by the federal courts but neither of said decisions are in point as to the facts of the case and are therefore omitted at this time.

As set forth in the second question a premise raised by this Petition deals with the decision of whether the Federal Courts should be bound by construction and recognition of similar contracts and similar circumstances between litigants wherein the court of the state has tacitly recognized a statutory construction. Specifically in the case at bar Petitioner without avail cited unto the Circuit Court, both in his initial brief and again in his Petition for rehearing, a parallel case to the cause at bar founded upon similar dealings but wherein actual construction of Chapter 475 of the Florida Statutes was not raised. The specific case was that of *Russell* v. *Thielan,* 82 So. 2d 143

(Florida), which was decided by the Florida court on June 29, 1955. It is a position of the Petitioner here that it was so obvious to the Florida court that "development contracts" and "joint venture" contracts do not fall within Chapter 475 of the Florida Statutes, that the point was not raised. On page 8 of the Petition for Rehearing filed by Petitioner with the Circuit Court of Appeals, Petitioner quoted the Florida court as its observations in this regard which are taken from the court's Opinion as published in 82 So. 2d 143, 144:

> "Thielan and Thierry being 'real estate developers' had no license to sell real estate for other owners and apparently for this reason the parties executed an option agreement."

The above cited case as in the case at bar involved the development of Florida real property for sale under a circumstance and agreement whereby one party was to furnish development skill and know-how and the other party was to furnish capital and land. Development in the case at bar included laying and platting of lots; installation of water and sewer; supervision of laying out and paving of streets, all of which services were performed as found by the judgment of the lower court. The Florida court in the Thielan case on page 145 of the text quoted and cited at length numerous authorities which are omitted here for sake of brevity. The essence of the court's view in announcing the law of Florida is summarized from a quotation, 48 C.J.S., Joint Adventures, Section 3, to-wit:

> "A joint venture is founded entirely on contract which may be either express or implied in whole or in part from the acts and conduct of the parties or the construction which the parties give to the contract between them."

After the omitted citations the Florida court concluded that the Thielan and Thierry agreement of owners contributing property and the developers contributing sales know-how and experience satisfied the test of joint venture.

In the case at bar not only are all of the tests of joint venture present as required by the Thierry case but in addition to that the Petitioner here actually was obligated to contribute personal moneys.

It is the simple position of this Petitioner that under a joint venture agreement the Petitioner specifically came within a recognized exception of Section 475.01 of the Florida Statutes in that he had an "ownership in the subject matter" and was therefore selling property in which he was jointly interested as a part of the adventure which position is certainly tacitly approved by the Supreme Court of Florida in the Thielan case.

Throughout the appellate proceedings of this cause it has always been and is now the prime position of this Appellant-Petitioner that the statute in question did not apply under any circumstances to the contracts of these parties for the reason that Exhibit "B", an integral part of this contract (Appendix, page A17) was specifically designed by the parties to comply with Section 475.01 of the Florida Statutes which contains the expressed exception as follows:

> "* * *; nor shall said terms be applied to one officer of every corporation engaged in the sale of its own properties who shall be its president unless otherwise provided in its charter or by-laws."

The third paragraph of Exhibit "B" provided as follows:

> "This corporation, after doing certain improvements, etc., to said land is to sell the land in the form of lots to private individuals and, in accordance with

a certain agreement existing between the aforementioned A. B. C. Excavating Company and myself, I am to be paid a certain percentage of the profit that is made from the sale of said property."

Considering the above quote and the plain language of the parties to the effect that the corporation was to sell, Petitioner Wegmann as President of said corporation specifically could sell for the Company. Petitioner was not being paid commissions from the sales but positively a "percentage of the profit" as stated in quote above. Appellant-Petitioner here is irrevocably driven to the conclusion that the United States District Court and the Court of Appeals have each failed to recognize and follow paramount rules for contract construction; said Courts have misapplied local statutes and have ignored the recognition of conduct by parties specifically approved by the state courts contrary to the pronouncements and former judgments of this court so clearly stated in the case of *Erie Railroad* v. *Thompkins*, 304 U.S. 64, 82 L.Ed. 1188. It is not the position of this Petitioner that the federal judiciary should be compelled to sift through a haystack to ascertain local law; however, neither should the courts of the federal judiciary revert to the rule of *Swift* v. *Tyson*, 16 Pet. (U.S.) 1, 10 L.Ed. 865, when local law is clearly presented.

CONCLUSION.

In conclusion Petitioner respectfully shows that this court should take cognizance of a matter of vast local importance to the entire State of Florida which is now an area of rapid development. Numerous persons having development skill and know-how are vitally linked with capital interest within and without the State of Florida to pursue this development trend. Especially should this court

adhere to the reasonable interpretations and inferences to be drawn from *Erie Railroad Company* v. *Thompkins* and instruct the Court of Appeals to follow the rules of construction as announced by the highest court of the State of Florida and to remand the cause for a new trial upon its merits.

Respectfully submitted,

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